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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Nina Mae Becker,

Plaintiff,

v.

Paul Penzone,

Defendant.

No. CV-23-01216-PHX-JAT (ESW)

ORDER

On July 3, 2023, Plaintiff Nina Mae Becker, who was then confined in a Maricopa County Jail, filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. In a July 18, 2023 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On July 31, 2023, Plaintiff filed a Notice of Change of Address indicating she is no longer in custody and a non-prisoner Application to Proceed In District Court Without Prepaying Fees or Costs (Doc. 9). On August 9, 2023, Plaintiff filed her First Amended Complaint (Doc. 11). The Court will grant the non-prisoner Application to Proceed and dismiss the First Amended Complaint with leave to amend.

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28

1 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 2 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 3 relief may be granted, or that seek monetary relief from a defendant who is immune from
 4 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

5 A pleading must contain a “short and plain statement of the claim *showing* that the
 6 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 7 not demand detailed factual allegations, “it demands more than an unadorned, the-
 8 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 9 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 10 conclusory statements, do not suffice.” *Id.*

11 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 12 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 13 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 14 that allows the court to draw the reasonable inference that the defendant is liable for the
 15 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 16 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 17 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 18 allegations may be consistent with a constitutional claim, a court must assess whether there
 19 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

20 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 21 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 22 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
 23 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 24 U.S. 89, 94 (2007) (per curiam)).

25 If the Court determines that a pleading could be cured by the allegation of other
 26 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
 27 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc).
 28 Plaintiff’s First Amended Complaint will be dismissed for failure to state a claim, but

1 because it may possibly be amended to state a claim, the Court will dismiss it with leave
2 to amend.

3 **II. First Amended Complaint**

4 In her single-count First Amended Complaint, Plaintiff seeks monetary relief from
5 Maricopa County Sheriff Paul Penzone. Plaintiff alleges that she entered the jail with a
6 severe staph infection and mental illness. She claims she was denied treatment for the
7 staph infection for 45 days and was denied mental health medication for 68 days. Plaintiff
8 asserts she was “constantly coughing and had trouble breathing due to black mold.” As
9 her injury, Plaintiff alleges that her post-traumatic stress disorder is much worse because
10 she was denied her medication for 68 days, she had a bladder infection, and she continues
11 to have breathing problems.

12 **III. Failure to State a Claim**

13 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
14 (2) under color of state law (3) deprived her of federal rights, privileges or immunities and
15 (4) caused her damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th Cir.
16 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d 1278,
17 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that she suffered a specific injury
18 as a result of the conduct of a particular defendant and she must allege an affirmative link
19 between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-
20 72, 377 (1976).

21 A pretrial detainee has a right under the Due Process Clause of the Fourteenth
22 Amendment to be free from punishment prior to an adjudication of guilt. *Bell v. Wolfish*,
23 441 U.S. 520, 535 (1979). “Pretrial detainees are entitled to ‘adequate food, clothing,
24 shelter, sanitation, medical care, and personal safety.’” *Alvarez-Machain v. United States*,
25 107 F.3d 696, 701 (9th Cir. 1996) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir.
26 1982)). To state a claim of unconstitutional conditions of confinement against an
27 individual defendant, a pretrial detainee must allege facts that show:

28 (i) the defendant made an intentional decision with respect to
the conditions under which the plaintiff was confined;

(ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries.

Gordon v. County of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018).

Whether the conditions and conduct rise to the level of a constitutional violation is an objective assessment that turns on the facts and circumstances of each particular case. *Id.*; *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005). However, “a de minimis level of imposition” is insufficient. *Bell*, 441 U.S. at 539 n.21. In addition, the “‘mere lack of due care by a state official’ does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.” *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (quoting *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). Thus, a plaintiff must “prove more than negligence but less than subjective intent—something akin to reckless disregard.” *Id.*

Plaintiff’s allegations are too vague to support that Defendant Penzone made an intentional decision that put her at substantial risk of serious harm. Plaintiff does not allege that Defendant Penzone was aware that she was denied treatment and medication, nor does she allege that Penzone was aware of black mold in the jail. Indeed, Plaintiff makes no allegations at all against Defendant Penzone. Thus, Plaintiff fails to state a claim against the sole Defendant.

IV. Leave to Amend

For the foregoing reasons, the Court will dismiss Plaintiff’s First Amended Complaint for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a second amended complaint to cure the deficiencies outlined above.

Plaintiff must clearly designate on the face of the document that it is the “Second Amended Complaint.” The second amended complaint must be retyped or rewritten in its

entirety and may not incorporate any part of the original Complaint or First Amended Complaint by reference. Plaintiff may include only one claim per count.

A second amended complaint supersedes the original Complaint and First Amended Complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat the original Complaint and First Amended Complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised in the original Complaint or First Amended Complaint and that was voluntarily dismissed or was dismissed without prejudice is waived if it is not alleged in a second amended complaint. *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

If Plaintiff files an amended complaint, Plaintiff must write short, plain statements telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of the Defendant who violated the right; (3) exactly what that Defendant did or failed to do; (4) how the action or inaction of that Defendant is connected to the violation of Plaintiff's constitutional right; and (5) what specific injury Plaintiff suffered because of that Defendant's conduct. *See Rizzo*, 423 U.S. at 371-72, 377.

Plaintiff must repeat this process for each person she names as a Defendant. If Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to state a claim. **Conclusory allegations that a Defendant or group of Defendants has violated a constitutional right are not acceptable and will be dismissed.**

Plaintiff should be aware that the Ninth Circuit Court of Appeals has held that "claims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard." *Gordon*, 888 F.3d at 1124-25 (quoting *Castro*, 833 F.3d at 1070). Like a conditions-of-confinement claim, to state a medical care claim, a pretrial detainee must show

(i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff’s injuries.

Id. at 1125. “With respect to the third element, the defendant’s conduct must be objectively unreasonable, a test that will necessarily ‘turn[] on the facts and circumstances of each particular case.’” *Castro*, 833 F.3d at 1071 (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015); *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

The “‘mere lack of due care by a state official’ does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.” *Castro*, 833 F.3d at 1071 (quoting *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). A plaintiff must “prove more than negligence but less than subjective intent—something akin to reckless disregard.” *Id.* A mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. *See Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985).

V. Warnings

A. Address Changes

Plaintiff must file and serve a notice of a change of address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other relief with a notice of change of address. Failure to comply may result in dismissal of this action.

B. Possible “Strike”

Because the First Amended Complaint has been dismissed for failure to state a claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies identified in this Order, the dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring

1 a civil action or appeal a civil judgment in forma pauperis under 28 U.S.C. § 1915 “if the
 2 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
 3 brought an action or appeal in a court of the United States that was dismissed on the
 4 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
 5 granted, unless the prisoner is under imminent danger of serious physical injury.” 28
 6 U.S.C. § 1915(g).

7 **C. Possible Dismissal**

8 If Plaintiff fails to timely comply with every provision of this Order, including these
 9 warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963 F.2d
 10 at 1260-61 (a district court may dismiss an action for failure to comply with any order of
 11 the Court).

12 **IT IS ORDERED:**

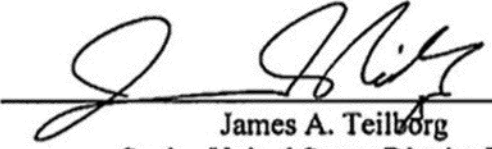
13 (1) Plaintiff’s non-prisoner Application to Proceed In District Court Without
 14 Prepaying Fees or Costs (Doc. 9) is **granted**. Plaintiff is not required to pay the balance
 15 of the filing fee.

16 (2) The First Amended Complaint (Doc. 11) is **dismissed** for failure to state a
 17 claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended
 18 complaint in compliance with this Order.

19 (3) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk
 20 of Court must, without further notice, enter a judgment of dismissal of this action with
 21 prejudice that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g)
 22 and deny any pending unrelated motions as moot.

23 Dated this 23rd day of October, 2023.

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James A. Teilborg
 Senior United States District Judge